Supreme Court, U.S.
FILED
OCT 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

5

IN THE UNITED STATES SUPREME COURT
October Term, 1989
Case No. 89-478

STATE OF MARYLAND,

Petitioner,

v.

SANDRA ANN CRAIG,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER*

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL FOR THE STATE OF FLORIDA

RICHARD E. DORAN (COUNSEL OF RECORD)
BRADLEY R. BISCHOFF
Assistant Attorneys General for the
State of Florida
Department of Legal Affairs
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR AMICI CURIAE

*The States joining in this brief are listed in Appendix "A" of this brief.

BEST AVAILABLE COPY

29 pp

QUESTION PRESENTED

WHERE INDIVIDUALIZED FINDINGS REGARDING THE NEED TO PROTECT CHILD WITNESSES ARE MADE AND THE WITNESSES, AGES FOUR TO SEVEN, ARE SUBJECTED TO CROSS-EXAMINATION AT TRIAL, DOES THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE REQUIRE A FACE-TO-FACE MEETING BETWEEN THE WITNESSES AND THE ACCUSED BEFORE A ONE-WAY CLOSED-CIRCUIT TELEVISION PROCEDURE MAY BE INVOKED?

TABLE OF CONTENTS

	PAGE(S)
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii-vi
INTEREST OF AMICI CURIAE	1-2
ARGUMENT	3-17
CONCLUSION	18
APPENDIX	A-1

TABLE OF AUTHORITIES

CASES	PAGE(S)
Commonwealth v. Willis, 716 S.W.2d 224, 228 (Ky. 1986)	13,15
Coy v. Iowa, 487 U.S. ____, 108 S.Ct. 2798 (1988)	9,15,16,17
Glendening v. State, 536 So.2d 212 (Fla. 1988) cert. denied 109 S.Ct 3219 (1989)	11
Kansas City v. McCoy, 525 S.W.2d 336, 339 (Mo. 1975)	13
People v. Algarin, 129 Misc. 2d 1016, ____, 498 N.Y.S.2d 977, 981 (1986)	12
People v. Moran, 114 Cal. Rptr. 413, 420, 39 Cal.App.3d 398, 410 (1974)	13
State v. Jarzbek, 204 Conn. 683, 696-97, 529 A.2d 1245, 1252 (1987)	14
State v. Sheppard, 197 N.J. 411, ____, 484 A.2d 1330, 1341 (1984)	13

CASES	PAGE(S)
State v. Twist, 528 A.2d 1250, 1258 (Me. 1987)	13
OTHER AUTHORITIES	
§ 92.54, Florida Statutes (1985)	11
ABUSED CHILDREN IN AMERICA: VICTIMS OF OFFICIAL NEGLECT, REPORT OF THE SELECT COMMITTEE ON CHILDREN, YOUTH, AND FAMILIES, J.R. REP. No. 260, 100th Cong., 1st Sess. (1987)	4
The Admissibility of Expert Psychological Testimony in Cases Involving the Sexual Misuse of a Child, 42 U.MIAMI L.REV. 1033 (1988)	17
Bainor, "The Constitutionality of the use of Two-Way Closed Circuit Television to Take Testimony of Child Victims of Sex Crimes," 53 Fordham L. Rev. 995, 1017 (1985)	6
Bjerregaard, "Televised Testimony as an Alternative in Child Sexual Abuse Cases," 25 Criminal Law Bulletin 164, 171 (1989)	10
BURGESS, Child Sex Initiation Rings, 51 AMERICAN JOURNAL OF ORTHOPSYCHIATRY III (Jan. 1981)	5

OTHER AUTHORITIES	PAGE(S)
Child Sexual Abuse Victims in the Courts: Hearings Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. 77 (1984)	4
Colby & Colby, "Videotaped Interviews in Child Sexual Abuse Cases: The Texas Example," 66 Child Welfare 25 (1987)	7
Conte, "The Justice System and Sexual Abuse of Children," 58 Social Serv. Rev. 556-568 (1984)	7
Coyle, Application of Confrontation Clause a Difficult Issue in Child Abuse Cases," _____ Nat'l L.J. 1, 10 (1987)	15
D. FINKELHOR, Child Sexual Abuse 1-2 (1984)	3
Goodman, "The Child Witness: Conclusions and Future Directions for Research and Legal Practice," 40 J. Soc. Issues 157, 167 (1984)	8
Hill & Hill, "Videotaping Children's Testimony: An Empirical View," 85 Mich. L. Rev. 809, 827 (1987)	6,9

TABLE OF AUTHORITIES (Continued)

OTHER AUTHORITIES	PAGE(S)
Libai, Protection of the Child Victim of a Sexual Offense in the Criminal Justice System," 15 Wayne L. Rev. 977, 982 (1969)	7
Lambert, "Victims Have Rights Too," 25 Utah L. Rev. 449, 455 (1986)	6
Preserving the Child Sexual Abuse Victims Testimony: Videotaping is not the Answer, 2 DETROIT COLLEGE OF LAW REV. 469, 479 (1987)	10
L. Schultz, The Sexual Victimization of Youth (1980)	6
Yun, A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases, 83 Colum.L.Rev. 1745 (1983)	3

INTEREST OF AMICI CURIAE

The States joined herein as amici curiae*, are deeply concerned with the decision of the Court of Appeals of Maryland because the ruling of the Court of Appeals as applied would have a detrimental effect on eliciting truthful testimony from the victims of child sexual abuse.

An overwhelming majority of states have statutes designed to protect the child victims of sexual abuse from the trauma associated with testifying in front of the abuser. Forty-one states have laws protecting child witnesses. Twenty-seven states have enacted videotaping statutes. Twenty-two states have enacted hearsay exception statutes. Twenty-six states have enacted courtroom

*The States joining this Petition are listed in Appendix "A" of this Brief.

closure statutes. Twenty-one states have enacted closed-circuit television statutes.[1] (See Petitioner's Appendix "C").

Rejection of Maryland's procedure for protecting child victims of abuse will weaken national efforts aimed at eradicating these crimes against society's most helpless victims.

---

[1] Forman, "To Keep the Balance True: The Case of Coy v. Iowa," 40 Hastings L.J. 437, 439 (1989).

ARGUMENT

The Amicus States agree with the Petitioner that the protection of child abuse victims is an issue of great public importance, and that the decision below in the Craig case represents an erosion of that protection. Conservative estimates of child sexual abuse point to an occurrence rate of between 100,000 and 300,000 cases a year nationwide.[2] The problem has moved Senator Arlen Specter, Chairman of The Subcommittee on Juvenile Justice to remark that:

> The molestation of children has now reached epidemic proportions. Even by conservative estimates, a young American will be sexually molested once every two minutes. Investigations. . .and filings of criminal complaints have no doubt increased in part because of public awareness campaigns. Children's television programming is peppered with public service announcements featuring child celebrities urging children

---

[2] D. FINKELHOR, Child Sexual Abuse 1-2 (1984) See also Yun, A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases, 83 Colum.L.Rev. 1745 (1983). See also:

to tell someone if they have been abused. Many cartoon programs contain story lines with the same message."[3]

Certainly reported cases have increased. See ABUSED CHILDREN IN AMERICA: VICTIMS OF OFFICIAL NEGLECT, REPORT OF THE SELECT COMMITTEE ON CHILDREN, YOUTH, AND FAMILIES, J.R. REP. No. 260, 100th Cong., 1st Sess. (1987). Based on an extensive survey with detailed statistics of the 50 states and the District of Columbia, this Report indicates that "[c]hild abuse and neglect, as reported to State child welfare agencies, have increased steadily since 1976 when reports were first available. Between 1981-85, reports of child abuse and neglect rose by more than half (54.9%) nationwide." Id. at 1. "In 1985 alone, an estimated 1,876,564 children [in the United

---

[3] Child Sexual Abuse Victims in the Courts: Hearings Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. 77 (1984). (Statement of Senator Arlen Specter, Chairman, Subcommittee on Juvenile Justice, with Vartabedian & Vartabedian, supra note 1, at 17.)

States] were reported to child protective service agencies as having been abused or neglected. . . ." Id. at 4; see also Lexington Herald-Leader, April 11, 1987, at B2, cols. 3-6 (According to the Kentucky Department of Social Services, "[t]here were just over 2,000 confirmed sexual attacks [on children reported in Kentucky during 1986], compared with 400 in 1980, and 10,160 cases of physical [child] abuse in 1986 compared with 3,811 in 1980.").

A serious impediment to eliciting truthful testimony from the victims of child sexual abuse is an inability of the child to recount the incident(s) of abuse in the presence of the abuser. Threats of retaliation, blackmail, or peer pressure, the "pledge of silence," obedience to the authority figure (abuser), and guilt or fear of exposure all can establish a virtually tight, impervious bond between the accused and the victim, resulting in inaccurate or misleading testimony.[4]

---

[4] BURGESS, Child Sex Initiation Rings, 51 AMERICAN JOURNAL OF ORTHOPSYCHIATRY III (Jan. 1981).

Prior to the enactment of recent protective statutes, criminal trial juries seldom heard from the children most traumatized by sexual assault and least capable of testifying because of the consequent psychic injury.[5] Psychiatrists believe that psychological damage is caused not only by the abuse but also by related subsequent events such as having to testify in open court in the same room as the defendant.[6] Children asked to testify in court can "become so further traumatized by the prospect of testifying in front of their alleged abusers that they cannot speak of the incident."[7] Studies of children

---

5 Lambert, "Victims Have Rights Too," 25 Utah L. Rev. 449, 455 (1986).

6 Bainor, "The Constitutionality of the use of Two-Way Closed Circuit Television to Take Testimony of Child Victims of Sex Crimes," 53 Fordham L. Rev. 995, 1017 (1985); L. Schultz, The Sexual Victimization of Youth (1980); Wixom, note 8 supra.

7 Hill & Hill, "Videotaping Children's Testimony: An Empirical View," 85 Mich. L. Rev. 809, 827 (1987). Coy v. Iowa, 108 S. Ct. at 874, states:

who have testified in court indicate that such testimony is associated with increased behavioral disturbances in children [quoting Goodman et al., "The Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims, Proceedings from tne International Conference on Child Witnesses: Do the Courts Abuse Children?" (British Psychological Association, in press)].

Several researchers have determined that traditional court procedures add to a child's psychological scars, producing "system-induced trauma."[8] One study[9]

> To the child who does not understand the reason for confrontation, the anticipation and experience of being in close proximity to the defendant can be overwhelming [quoting Whitcomb, Shapiro & Stellwagen, "When the Victim is a Child," Issues for Judges & Prosecutors 17-18 (1985)].

8 Colby & Colby, "Videotaped Interviews in Child Sexual Abuse Cases: The Texas Example," 66 Child Welfare 25 (1987); Conte, "The Justice System and Sexual Abuse of Children," 58 Social Serv. Rev. 556-568 (1984); Libai, Protection of the Child Victim of a Sexual Offense in the

compared a sample of children who had testified in court with a random sample of sex abuse victims and found that 73 percent of the court victims had behavioral problems compared with only 57 percent of the random sample. The researchers attributed these differences to the trauma of testifying in court. Others have also reported that child sex abuse victims who must participate in court proceedings experience greater trauma than those who do not. These differences, however, may be attributable to the fact that it is usually the most serious cases that result in a trial.[10]

Additionally, empirical research suggests that physical confrontation with the defendant may even damage the reliability, quality, and often the very

---

Criminal Justice System," 15 Wayne L. Rev. 977, 982 (1969).

9 Goodman, "The Child Witness: Conclusions and Future Directions for Research and Legal Practice," 40 J. Soc. Issues 157, 167 (1984).

10 Id.

existence of the child's testimony.[11] The child can become so intimidated by the presence of the defendant that he or she cannot speak about the incident.[12] As Justice Blackmun noted in his dissent in Coy v. Iowa, the use of protective measures can actually enhance the reliability of the testimony of child sex abuse victims.[13]

Research indicates that direct confrontation with a defendant can have a significant and detrimental impact on memory.[14] In one study, children watched a father-daughter confrontation on videotape. The children were then questioned in a law school courtroom or a room with two-way mirrors and a microphone suspended from the ceiling (to stimulate videotape testimony). The children testifying in the latter

---

11 Hill & Hill, note 21 supra, at 820

12 Id. at 827.

13 Coy v. Iowa, 108 S. Ct. at 874.

14 Hill & Hill, note 21 supra, at 814-815.

setting answered specific questions correctly more often and said "I don't know" or gave no answer significantly less often. This suggests that taking children's testimony via closed-circuit television instead of in open court may actually enhance the veracity of the child's statements.[15]

Face-to-face confrontation between a victim accuser and a defendant accused is a most terrifying experience, and one which is aggravated when the accusations involve socially taboo conduct. The child and even his parent may be ignorant of the judicial process and sometimes do not realize that they will eventually encounter the offender in the courtroom.[16]

---

15 Bjerregaard, "Televised Testimony as an Alternative in Child Sexual Abuse Cases," 25 Criminal Law Bulletin 164, 171 (1989).

16 Preserving the Child Sexual Abuse Victims Testimony: Videotaping is not the Answer, 2 DETROIT COLLEGE OF LAW REV. 469, 479 (1987).

Such face-to-face confrontation is even more terrifying when the adult offender is a member of the child's family, a relative, or a friend. Since the majority of child sexual abuse prosecutions involve these type of defendants, it is not hard to imagine the devastating impact on a child who must explain the details of a sexual encounter in front of the defendant, with whom the child has learned to love and trust but who may have threatened the child into silence.[17]

Twenty-one states have statutes providing for the use of one-way or two-way closed circuit television testimony of child victims. (See Petitioner's Appendix "C"). These statutes are designed to protect child victims of sexual abuse from further trauma associated with the prosecution of the abuser.[18]

---

17 Id.

18 Florida's Section 92.54, Florida Statutes (1985), provides for the use of closed circuit television testimony. The Florida Supreme Court has consistently upheld the constitutionality

The use of two-way closed-circuit television is unique in that it does provide the opportunity for the accuser to view the accused and vice versa. The use of such a technique closely approximates the traditional courtroom testimony since the child testifies under oath, within full view of the jury, and is subjected to unrestricted cross-examination. Therefore, the substantive concerns of the confrontation clause remain fully protected. Together, these factors help ensure the fairness of the proceedings by allowing the child and the defendant to see each other.

Furthermore, the opportunity for the trier of fact to observe the witness's demeanor is preserved with the use of televised testimony. In **People v. Algarin**, 129 Misc. 2d 1016, ____, 498 N.Y.S.2d 977, 981 (1986), the court

---

of Florida Statutes providing for the out-of-court testimony of child sexual abuse victims. See e.g. **Glendening v. State**, 536 So.2d 212 (Fla. 1988) cert. denied 109 S.Ct 3219 (1989).

stated: "It is apparent to this court from a demonstration of the equipment used in this case that closed circuit television has the capacity to present clear and accurate sounds and images to the defendant, the witness, the judge, the jury and the public. . . . [I]nstantaneous closed circuit television can surely satisfy the dictates of the Confrontation Clause.";

In **State v. Sheppard**, 197 N.J. 411, ____, 484 A.2d 1330, 1341 (1984) the court stated: "Videotape is sufficiently similar to live testimony to permit the jury to properly perform its function." (quoting **People v. Moran**, 114 Cal. Rptr. 413, 420, 39 Cal.App.3d 398, 410 (1974);

In **Kansas City v. McCoy**, 525 S.W.2d 336, 339 (Mo. 1975) the court held that that televised testimony did not significantly affect the ability to question and observe the witness, and jury impact was found to be little different, whether the witness appeared in court in person or by television. Modern televising techniques are capable of presenting clear and undistorted images, and in some instances are an

improvement over the view that the jury has of the witness.[19] For example, with the use of a zoom lens and large television screens, the witness's facial details can be observed with great clarity.[20]

Last, the child testifies while under oath, preserving the seriousness and solemnity of the occasion.

Contemporaneous televised testimony adheres closely to the giving of testimony in the traditional courtroom setting, except that the child is not in the physical presence of the defendant. Thus, televised testimony is the functional equivalent of testimony from within the courtroom. In **State v. Jarzbek**, 204 Conn. 683, 696-97, 529 A.2d 1245, 1252 (1987) the court wrote; "We agree with the state that the circumstances surrounding the taking of the minor victim's testimony make it

---

19 **See State v. Twist**, 528 A.2d 1250, 1258 (Me. 1987); **Commonwealth v. Willis**, 716 S.W.2d 224, 228 (1986).

20 **See Sheppard**, 197 N.J. at ____, 484 A.2d at 1334.

inherently more reliable than the out-of-court declarations characterized as hearsay. Rather than view the videotaped testimony as hearsay, we therefore consider it to be the functional equivalent of testimony in court."; (See also **Commonwealth v. Willis**, 716 S.W.2d 224, 228 (Ky. 1986) ("[T]elevised testimony under [the Kentucky] statute is not hearsay. It is the functional equivalent of testimony in court."). This is a far cry from the one-way screen used in Coy.[21]

---

21 Prof. Paul J. Papak of the University of Iowa College of Law, who represented Mr. Coy before the [United States] Supreme Court, says he recreated the scene by entering the courtroom where the defendant was convicted and dragging out the screen to see how it worked.

"It's hard to adequately describe its impact," he says. The courtroom's lights were turned off, its blinds were drawn, and a panel of four, bright-focus lights were trained onto the screen in order to activate the one-way coating.

The two girls could see only the reflection of the judge's bench next to them, he says. The defendant saw a darkened image of the two witnesses. In the trial record, Professor Papak notes, the judge described the effect as "dramatic" and "eerie."

The States joining this Petition submit that the Craig decision conflicts with Coy v. Iowa, 487 U.S. ____, 108 S.Ct. 2798 (1988) in that the Maryland court overextended Confrontation Clause precepts without giving due weight to the compelling public interest of protecting child sex abuse victims. See Coy v. Iowa, supra, (O'Conner, J. concurring);

> "...I would permit use of a particular trial procedure that called for something other than face-to-face confrontation if that procedure was necessary to further an important public policy... The protection of child witnesses is, in my view and in the view of a substantial majority of the States, just such a policy." 101 L.Ed.2d at 869.

Less drastic and more logical alternatives exist. An adequate showing of the probability of emotional trauma can be made without requiring the presence of the defendant at the

---

Coyle, Application of Confrontation Clause a Difficult Issue in Child Abuse Cases," ____ Nat'l L.J. 1, 10 (1987).

pretrial hearing by using expert psychological testimony and personal observation of the victim by the judge.[22]

Maryland's statute accomplishes the constitutional task of affording the defendant his right of confrontation while also protecting the rights of children. The misguided effort of the Maryland court of appeals creates conflict between Maryland and the plurality in Coy v. Iowa and the other state decisions discussed by Petitioner in its brief. The court's action misapplied the holding in Coy v. Iowa and imposed an unrealistic procedure which will result in further harm to child sex abuse victims.

Accordingly, the states joined herein as amici curiae respectfully urge this Court to accept certiorari in this case.

---

22 See The Admissibility of Expert Psychological Testimony in Cases Involving the Sexual Misuse of a Child, 42 U.MIAMI L.REV. 1033 (1988).

CONCLUSION

The States joining this Petition submit that certiorari should be granted to review the decision of the Court of Appeals of Maryland.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL FOR THE
STATE OF FLORIDA

RICHARD E. DORAN*
Assistant Attorney General
for the State of Florida

BRADLEY R. BISCHOFF
Assistant Attorney General
for the State of Florida

Department of Legal Affairs
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR AMICI CURIAE

*Counsel of Record

APPENDIX "A"

APPENDIX "A"

Honorable Don Siegelman
Attorney General of Alabama

Honorable Douglas B. Baily
Attorney General of Alaska

Honorable Robert K. Corbin
Attorney General of Arizona

Honorable John J. Kelly
Chief State's Attorney of Connecticut

Honorable Charles M. Oberly, III
Attorney General of Delaware

Honorable Jim Jones
Attorney General of Idaho

Honorable Neil F. Hartigan
Attorney General of Illinois

Honorable Linley E. Pearson
Attorney General of Indiana

Honorable Tom Miller
Attorney General of Iowa

Honorable Robert T. Stephan
Attorney General of Kansas

Honorable Frederic J. Cowan
Attorney General of Kentucky

Honorable William J. Guste, Jr.
Attorney General of Louisiana

Honorable Frank J. Kelley
Attorney General of Michigan

Honorable Hubert H. Humphrey, III
Attorney General of Minnesota

Honorable Mike Moore
Attorney General of Mississippi

Honorable William L. Webster
Attorney General of Missouri

Honorable Brian McKay
Attorney General of Nevada

Honorable John P. Arnold
Attorney General of New Hampshire

Honorable Peter N. Perretti, Jr.
Attorney General of New Jersey

Honorable Hector Rivera-Cruz
Attorney General of Puerto Rico

Honorable T. Travis Medlock
Attorney General of South Carolina

Honorable Roger A. Tellinghuisen
Attorney General of South Dakota

Honorable Paul Van Dam
Attorney General of Utah

Honorable Jeffrey L. Amestoy
Attorney General of Vermont

Honorable Godfrey R. de Castro
Attorney General of the Virgin Islands

Honorable Mary Sue Terry
Attorney General of Virginia

Honorable Joseph B. Meyer
Attorney General of Wyoming

Honorable Roger W. Tompkins
Attorney General of West Virginia